Supreme Court, U.S.
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In The

Supreme Court of the United States

DEBORAH ELLIS,
JENNIFER BROWN, SINDIE HOUSE,

Petitioners,

vs.

MISSISSIPPI DEPARTMENT OF HEALTH,
THERESA PATTON, CYNTHIA LESURE, TINA MOORE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was St. George Tucker correct when he told his William & Mary law students in *circa* 1803 that *all* searches and seizures were considered general warrants and thus unconstitutional under the Fourth Amendment *unless* based on probable cause, supported by oath or affirmation and particularly describing the place to be searched and things to be seized; or, in the alternative, whether this Court correctly interpreted the Fourth Amendment when it decided that businesses in a "pervasively regulated" industry may be searched without a warrant; and, if St. George Tucker was correct, whether this Court should overrule its decision in *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987)?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at App. 1 to the petition and is unpublished.

The opinion of the United States District Court denying Motion For Reconsideration appears at App. 6 to the petition and is unpublished.

The opinion of the United States District Court dismissing the case appears at App. 14 to the petition and is unpublished.

The Order of the United States District Court dismissing the case appears at App. 38 to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was September 2, 2009.

No petition for rehearing was filed.

No extension of time to file the petition for a writ of certiorari has been requested nor one granted.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Miss. Code Ann. §43-20-15:

> The licensing agency [Mississippi Department of Health] shall make or cause to be made inspections relative to the compliance with the laws and regulations governing the licensure of child care facilities. Such inspections shall be made at least once a year but additional inspections may be made *as often as deemed necessary* by the licensing agency. (emphasis added)

STATEMENT OF THE CASE

This is a federal question case seeking money damages from the defendants in their individual

capacities under 42 U.S.C. §1983 based on Fourth Amendment claims arising out of three warrantless searches made at Petitioner's facility, the Susie M. Brooks Child Care Center in Greenwood, Mississippi. The searches occurred on January 29, 2004; May 14, 2004; and, December 14, 2005.

The legal issue presented is whether the "pervasively regulated" industry warrantless search exception carved out of the Fourth Amendment by this Court in *New York v. Burger,* 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) is consistent with the original intent of the Framers of the Constitution which was that *all* searches and seizures were considered general warrants and thus unconstitutional unless based on probable cause, supported by oath or affirmation and particularly describing the place to be searched and the things to be seized.

The relevant regulatory context is the extent of the right of the Mississippi Department of Health to search a child care provider's facility on the basis of an "anonymous" complaint of child abuse which violates both the applicable child care regulations and is also a crime under Mississippi statutory law. Miss. Code Ann. §97-5-39 (1972).

The facts of the case are simple. The Mississippi Department of Health searched Petitioner's child care facility, without a warrant and without probable cause, three times – twice based on "anonymous" phone calls complaining of child abuse. In the case of at least one of these calls, there is strong circumstantial evidence that it was a fabrication by a Department

of Health official. The third warrantless search was based on an "anonymous" complaint of child abuse.

In none of the three instances was child abuse ever formally charged or pursued. In fact, except for the warrantless general searches, the Health Department never took any formal steps as to child abuse. However, once on the premises, the investigators also performed administrative inspections and fined Petitioner for minor regulatory violations totally unrelated to any claim of child abuse.

The case was originally filed on April 13, 2007, in the Circuit Court of Leflore County, Mississippi and removed on May 14, 2007, by the defendants to the United States District Court for the Northern District of Mississippi.

The District Court entered its 12(b)(6) Order dismissing the Plaintiffs' complaint on May 8, 2008. A Rule 59/60 reconsideration motion was filed on May 21, 2008. The Court entered its Order denying reconsideration on February 5, 2009. A notice of appeal was filed on March 4, 2009. The Fifth Circuit Court of Appeals on September 2, 2009, upheld the District Court's dismissal.

REASONS FOR GRANTING THE WRIT

As Justice Scalia said last term about the Second and Fourth Amendments:

> Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. . . . "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed. . . ."[1]

In determining whether a search is "unreasonable" within the meaning of the Fourth Amendment, "we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, ___ U.S. ___, 128 S. Ct. 1598, 1602, 170 L. Ed. 2d 559 (2008). Only when history fails to provide a conclusive answer, do we then analyze a search or seizure in light of traditional standards of reasonableness, "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v. Moore*, *supra*,

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[1] *District of Columbia v. Heller*, ___ U.S. ___, 128 S. Ct. 2783, 2797-98, 171 L. Ed. 2d 637 (2008).

128 S. Ct. at 1604. In fact we know that "The immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that English judges had employed against the colonists." *Id.*

The history of the Fourth Amendment is unmistakably clear. Its purpose was to prevent the issuance of general warrants. CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, VOL. II, at 124-25, 521-25, Little & Brown (1850), as reprinted in http://www.Questia.com. The "pervasively regulated" exception carved out in *Burger* is nothing more than a general warrant. *Burger* must therefore be reversed as bad law.

St. George Tucker was a law professor at the College of William and Mary in Williamsburg, Virginia from 1790 until his appointment to the bench in 1804. While at the college he authored an edition of Blackstone's *Commentaries,* annotated with American law. Hardy, *The Lecture Notes of St. George Tucker: A Framing of The Bill of Rights*, 103 Nw. U. L. Rev. Colloquy 272 (2008). During the last term, in *District of Columbia v. Heller*, *supra*, both the majority[2] and the dissent[3] cited Tucker's annotated *Commentaries*

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[2] *Heller*, *supra*, 128 S. Ct. at 2805.

[3] *Heller*, *supra*, 128 S. Ct. at 2839, at fn. 32.

as authoritative proof of the original intent of the Second Amendment.

Tucker also included his understanding of the Fourth Amendment in his lecture notes. It was his conclusion that general warrants were always "unreasonable" and no search comported with the Amendment unless conducted pursuant to a warrant based on probable cause:

> "The right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches and seizures, shall not be violated – What shall be deemed unreasonable searches and seizures. The same article informs us, by declaring, 'that no warrant shall issue,' but first, upon probable cause – which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly describe the place to be searched; and fourthly – the persons, or things to be seized. ***All other searches or seizures, except such as are thus authorized, are therefore unreasonable and unconstitutional***. . . . The case of general warrants, under which term all warrants except such as are above described are included, was warmly agitated in England about thirty years ago – and after much altercation they were finally pronounced to be illegal by the common law – see . . . *Money v. Leach,* 3 Burrow 1743. 1 Bl. Rep. 555. . . ."

Hardy, *The Lecture Notes of St. George Tucker*, *supra,* 103 Nw. U. L. Rev. Colloquy, at 280 (emphasis added)

Petitioners contend that their position is analogous to that of the Boston Merchants who, in 1761, opposed the granting of a general warrant to the crown. Allowing Health Department inspectors the luxury of hiding behind Health Department regulations to legitimize a right to inspect and/or search Petitioners' child care center whenever they want, for no apparent reason other than a regularly occurring ostensibly "anonymous" report, with neither Petitioners nor any court having a right to question their motives, is nothing more than a general search warrant such as was condemned by the Founding Fathers when they drafted the Fourth Amendment.[4]

Lest the Court should think Petitioners are a lone voice crying out in the wilderness, in a book published long after this case began the author made the same argument to overrule *Burger* saying:

> In this book, I argue that the original understanding of the Fourth Amendment differentiated between searches on property and searches in public areas, generally requiring warrants to search property, while allowing warrantless searches in public areas if there was cause for the search. However, in the twentieth century this intent has

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[4] There is a wonderfully done *amicus* brief on the web which catalogs numerous other authorities on writs of assistance. See the brief filed on behalf of the National Association of Criminal Defense Lawyers in *Arizona v. Johnson*, Supreme Court No. 07-1122; on the web as a PDF document at American Bar Association, http://www.supremecourtpreview.org.

been subverted. The government has weakened protections against searches of property, specifically commercial property, while expanding protections against searches in public areas.

This development arises from a change in the conception of justice among many political and legal thinkers. In the twentieth century these thinkers saw a need for an administrative state to control and regulate a vast economy that seemed to benefit only the wealthy.

The idea that government must increase the regulation of business led to a change in the judiciary's (and other government agencies) approach to commercial searches. The public interest, as defined by government agencies, began to take preference over businessmen's Fourth Amendment rights. So, for example, we got the administrative warrant, which is a warrant that does not require probable cause.

In the case of searches in public areas, the judiciary in the twentieth century has applied a much stricter standard than the Founding generation. The modern judiciary, with some retreat since the 1990's, has required warrants to search in public areas, while early jurists required only probable cause. This development is also due to a changed conception of justice, in which the modern judiciary has embraced a notion of liberty that emphasizes freedom divorced

> from morality. Furthermore, criminals come to be seen as the victims of society, in need of protection from the judiciary and other elites.
>
> I argue that the Founder's understanding of justice and the importance of protecting property rights serve society better than the modern understanding of justice and our Fourth Amendment jurisprudence would be more just if we returned to the original understanding.[5]

CONCLUSION

Certiorari should be granted not simply because this case is important to the parties but because of its importance to the public at large. "Pervasively regulated" industries include, among others: commercial trucking; firearms; liquor; all types of mining, surface and sub-surface; commercial fishing; shipping; pleasure boating; food and drug dealers; government contractors supplying food to the military; plant separating burnable coal residue out of material dredged from riverbed; rock quarries, even a family-operated decorative rock quarry; licensed automobile dismantlers, used parts dealers, and second-hand goods dealers; auto diagnostic and repair clinics;

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[5] Newman, *Against That Powerful Engine of Despotism – The Fourth Amendment And General Warrants At the Founding And Today*, Univ. Press of America (2007) at x (preface).

taverns; and, institutions giving medical care to the aged and infirm, skilled nursing homes, hospitals and similar institutions. *United States v. Castelo*, 415 F.3d 407, 410 (5th Cir. 2005); *Marshall v. The Texoline Co.*, 612 F.2d 935, 937 (5th Cir. 1980); *Rush v. Obledo*, 517 F. Supp. 905, 911 (N.D. Cal. 1981) (and all the cases cited therein).

The history of the Amendment is clear. It makes no provision for a warrantless search in a "pervasively regulated" industry. There is therefore no reason or need to engage in a balancing of interests.

In 1878 L.Q.C. Lamar, United States Senator from Mississippi, and later a Justice of this Court, acted contrary to the specific instructions of the Mississippi legislature and voted against the Bland Silver bill which would have introduced bi-metalism. Thus, voting against increasing the money supply which would have made much needed capital available to Mississippi businessmen and farmers.

Before casting his vote Lamar made his now famous speech, "Today, I must be true or false," which was lauded by all the major newspapers, in both the North and South, as a masterful statement of principle. Lamar said:

> "Mr. PRESIDENT: Between these resolutions and my convictions there is a great gulf. I cannot pass it. . . . Upon the youth of my state whom it has been my privilege to assist in education I have always endeavored to impress the belief that truth was better

> than falsehood, honesty better than policy, courage better than cowardice. Today my lessons confront me. Today I must be true or false, honest or cunning, faithful or unfaithful to my people. Even in this hour of their legislative displeasure and disapprobation, I cannot vote as these resolutions direct. I cannot and will not shirk the responsibility which my position imposes. My duty, as I see it, I will do; and I will vote against this bill."[6]

Like Lamar, this Court faces a great gulf. Today this Court must either be true to St. George Tucker's correct interpretation of the Fourth Amendment that all searches require a warrant supported by probable cause or it must be false and continue to support the *Burger* holding. Today, the Court's lessons confront it. The proper course is clear. There is no "pervasively regulated" exception to the Fourth Amendment.

Clearly *Burger* was wrongly decided. Just as clearly the determination of this issue vitally affects a large segment of the country's economy, in every one of the fifty states. Determination of this issue is therefore important enough to occupy the time and

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[6] EDWARD MAYES, LUCIUS Q. C. LAMAR, HIS LIFE, TIMES AND SPEECHES, Publishing House of The Methodist Episcopal Church, South (2d ed. 1896) at 334.

attention of this Court. Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: November 30, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60170
Summary Calendar

DEBORAH ELLIS, ET AL

Plaintiffs-Appellants

v.

MISSISSIPPI DEPARTMENT OF HEALTH, ET AL

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 4:07-CV-81

(Filed Sep. 2, 2009)

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiffs brought suit against the Mississippi Department of Health and thirteen of its employees in their official and individual capacities alleging constitutional violations stemming from three separate warrantless searches of the Susie M. Brooks Child Care Facility by the Mississippi Department of Health (MSDH). The searches were conducted pursuant to Mississippi statute permitting inspections of child care facilities.[1] The district court granted the defendants' motion to dismiss under Rule 12(b)(6) on the grounds of qualified immunity and denied the plaintiffs' motion for reconsideration. The plaintiffs appeal the district court's ruling dismissing the claims against the defendants in their individual capacities only. For the reasons set forth below, we agree with the district court and affirm.

We review a district court's decision on a 12(b)(6) motion to dismiss de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff."[2] Likewise, the review of a motion to alter or amend judgment under Rule 59(e) is reviewed de novo to the extent that the ruling was a reconsideration of a question of law.[3]

When, as in this case, a defendant raises the defense of qualified immunity the plaintiff must

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[1] MISS. CODE ANN. § 43-20-15.

[2] *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007).

[3] *DeCarlo v. Bonus Stores, Inc.*, 512 F.3d 173, 175 (5th Cir. 2007).

satisfy a two-prong test: "First, he must claim that the defendants committed a constitutional violation under current law. Second he must claim that the defendants' actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of."[4] The district court rightfully found that the searches were permitted under *New York v. Burger,* which permitted administrative searches of pervasively regulated industries if they met certain criteria.[5] Thus there was not a constitutional violation under current law.

Plaintiffs first ask us to overrule *Burger.* We recognize this argument is made to preserve the issue for appeal as this court is bound by Supreme Court precedent.[6]

In the alternative, plaintiffs claim that the licensing laws do not meet the standards of *Burger* as they do not provide an adequate substitute for a warrant. Under *Burger,* a warrantless administrative search of a pervasively regulated business is constitutionally permitted if: 1) there is a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; 2) the inspection is necessary to further the regulatory

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[4] *Club Retro, L.L.C. v. Hilton,* 568 F.3d 181, 194 (5th Cir. 2009) (citations omitted).

[5] 482 U.S. 691 (1987).

[6] *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989)

scheme; and 3) the statutory or regulatory scheme provides a constitutionally adequate substitute for a warrant.[7] The plaintiffs claim the third prong of this test is not met as the statute permits inspections by the agency "as often as deemed necessary."[8] The district court's analysis on this issue is thorough and correct. The statutes provided notice to licensed facilities of possible inspections and the agency officials were limited to searches within the scope of their narrowly defined duties.[9] Under *Burger* and this court's subsequent applications, the searches were constitutionally adequate.[10]

Additionally, even if this were a close case, the district court was correct in finding that the plaintiffs had not carried the burden of proof in demonstrating

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[7] *U.S. v. Castelo*, 415 F.3d 407, 409-10 (5th Cir. 2005) (citing *Burger*, 482 U.S. at 702-03).

[8] MISS. CODE ANN. § 43-20-15.

[9] *Id.*

[10] *See United States v. Castelo*, 415 F.3d at 411 (discussing limitations on searches by Mississippi Department of Transportation officials); *see also Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629 (5th Cir. 2000). The plaintiffs' claim that the holding of *Beck* turned on the fact that language stating searches were permitted "on demand" had not yet been added to the statute at issue. The plaintiffs misread the opinion. Rather, the opinion was merely careful to point out which language would be considered as there had been subsequent amendments. It did not suggest that the later addition of "on demand" would have led to a different outcome.

that the agency employees' actions were objectively unreasonable.

The district court's rulings are AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DEBORAH ELLIS, et al. **PLAINTIFFS**

v. **CIVIL ACTION NO.: 4:07CV81-SA**

MISSISSIPPI DEPARTMENT OF HEALTH, et al. **DEFENDANTS**

ORDER ON MOTION FOR RECONSIDERATION

(Filed Feb. 5, 2009)

Comes now before this Court, Plaintiff's Motion for Reconsideration [18].[1] After reviewing the motions, responses, rules, and authorities, the Court makes the following findings:

Factual Background

The Court issued an opinion and order granting the Defendants' Motion to Dismiss [16]. Specifically, this Court held that the Mississippi Department of Health ("MDH") is not subject to suit under 42 U.S.C. § 1983 as an arm of the state, the MDH employees in their official capacities were entitled to that same

[1] The docket also notes that Plaintiffs filed a second Motion for Reconsideration [27]. However, after reviewing that document, it is clear to this Court that Plaintiffs were not requesting an additional reconsideration but misfiled their Rebuttal Memorandum as a motion for reconsideration. Therefore, this "motion" is moot.

defense, and those employees in their individual capacities were entitled to qualified immunity. Therefore, this Court dismissed the Plaintiffs' claims.

The Plaintiffs have filed a Motion for Reconsideration pursuant to Federal Rule of Civil Procedure 59(e). Particularly, Plaintiffs' seek to have this Court revisit whether the MDH employees are entitled to qualified immunity in their individual capacities.

Reconsideration Standard

The Federal Rules of Civil Procedure do not recognize a motion for reconsideration in those words. *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n.14 (5th Cir. 1994) (en banc). However, the Fifth Circuit has held that such a motion may be entertained by a court and should be treated either as a motion to alter or amend pursuant to Rule 59(e), or a motion for relief from judgment pursuant to Rule 60(b). *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 328 n.1 (5th Cir. 2004). Specifically, if the motion for reconsideration is filed and served within ten days of the rendition of judgment, the motion falls under Rule 59(e). *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998). Because the current motion was filed within ten days of the judgment, the Court will consider it under Rule 59(e). *See, e.g., Neely v. Regions Bank, Inc.*, 2007 U.S. Dist. LEXIS 11775, 2007 WL 571111 (N.D. Miss. Feb. 20, 2007).

Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir. 1990). Under Rule 59(e), there are three possible grounds for granting a motion for reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or prevent manifest injustice. *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002). The motion to amend a judgment under Rule 59(e) "must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003).

Application and Analysis

Turning to the instant case, Plaintiffs assert that this Court's holding that the Plaintiffs had no reasonable expectation of privacy because day care facilities are a pervasively regulated industry is contrary to the history and meaning of the Fourth Amendment. Moreover, Plaintiffs argue that *New York v. Burger,* 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987), and its progeny were wrongly decided by the United States Supreme Court. Alternatively, the Plaintiffs argue that the MDH inspection program does not provide a constitutionally

adequate substitute for a warrant and is unconstitutional under the Fourth Amendment.

In a forty-five page brief, the Plaintiffs outline the history of this country's concern with protecting citizens' property from interference by the government. Citing the *Magna Carta,* Adam Smith, Alexis de Tocqueville, and Sherlock Holmes, Plaintiffs argue that the United States Supreme Court's interpretation of the Fourth Amendment is not in line with the intentions of our Constitutional forefathers.

This Court is bound to follow prior case law established by the Fifth Circuit and the United States Supreme Court. *See Loumar, Inc. v. Smith,* 698 F.2d 759, 762 (5th Cir. 1983). Thus, this Court will not challenge those rulings consistently handed down by its' [sic] appellate courts. Plaintiffs readily admit that these arguments were made in their original opposition to the Defendants' Motion to Dismiss.

In the memorandum opinion on May 8, 2008, this Court laid out the standard for establishing qualified immunity:

> A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

After an extensive analysis of the Fourth Amendment and United States Supreme Court precedent, this Court determined that due to the extensive regulations promulgated by the State and the necessity of open access granted to parents of children enrolled in a daycare, child care business owners have a lower subjective expectation of privacy because that industry is pervasively regulated. *See United States v. Blocker,* 104 F.3d 720, 728 (5th Cir. 1997). Child care business owners are aware at the time of their licensure that they are subject to search at any time and must freely permit parents of those children cared for in their facility open access at all times to the facility. Thus, the three searches performed by MDH were not clearly established constitutional violations of the Fourth Amendment, and the individuals were entitled to qualified immunity.

As the Plaintiffs have not presented an intervening change in controlling law; the availability of new evidence not previously available; or the need to correct a clear error of law or prevent manifest injustice as to this point of law, the Motion for Reconsideration is denied.

Plaintiffs also attached to their Motion for Reconsideration several affidavits alleging that the search decisions were based on false information. Plaintiffs allege that the individual defendants are not entitled to qualified immunity because it was not objectively reasonable to knowingly base a search decision on false information. These allegations were not presented to the district court in the briefing on

the Motion to Dismiss. However, the Court notes that the information could have been presented to the Court prior to dismissal. Plaintiffs have failed to show that this evidence was previously unavailable and thus, cause for this Court to reconsider its' [sic] prior ruling. Defendants have filed a Motion to Strike [26] these affidavits because they were not presented to the Court for consideration on the motion to dismiss. Because Plaintiffs had knowledge and the ability to bring forth these facts and chose not to assert them prior to the dismissal, these affidavits are hereby struck. Defendants Motion to Strike [26] is granted.

Regardless of Plaintiffs failure to bring this information to the Court's attention, qualified immunity would still be available to the individual defendants because Plaintiffs have failed to show that they violated a clearly established constitutional right. In its memorandum opinion, this Court noted the step-by-step analysis for qualified immunity:

> Although qualified immunity is an affirmative defense, *see Gomez v. Toledo,* 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980), once the defendant pleads qualified immunity, the burden shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See Pierce v. Smith,* 117 F.3d 866, 871 (5th Cir. 1997) (where § 1983 defendant pleads qualified immunity and shows he is a government official whose position involves the exercise of discretion, plaintiff has the burden to rebut qualified

> immunity defense by establishing the violation of clearly established law).

Thus, because Plaintiffs have failed to show that the right allegedly violated was clearly established at the time of the searches, the Court does not have to reach the "objectively reasonable" analysis.

Plaintiffs also argue that if the Court affirms its prior finding that there was no clearly established constitutional right violated in this case, this Court should deem the statutory scheme of MDH regulatory inspections unconstitutional as an inadequate substitute for a warrant.

This Court, in its memorandum opinion, specifically held that MDH's regulations were a constitutionally adequate substitute for a warrant. In particular, the Court noted that upon applying for and receiving a state-issued license, the statute provides notice to the licensee that regular and unannounced inspections will occur. Moreover, the statutes provide notice of how to comply with the regulations. Therefore, inspectors are sufficiently limited in the scope of their searches to those violations of the enumerated regulations.

As Plaintiffs have failed to bring forth any intervening change in controlling law; the availability of new evidence not previously available; or the need to correct a clear error of law or prevent manifest injustice, the Motion for Reconsideration is denied.

SO ORDERED, this the 5th day of February, 2009.

/s/ Sharion Aycock
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DEBORAH ELLIS, et al.	**PLAINTIFFS**
v.	**CIVIL ACTION NO.: 4:07CV81**
MISSISSIPPI DEPARTMENT OF HEALTH, et al.	**DEFENDANTS**

OPINION ON MOTION TO DISMISS

(Filed May 8, 2008)

Plaintiffs Deborah Ellis, Jennifer Brown, M.T. Person III, and Sindie House filed suit in Leflore County Circuit Court alleging various constitutional violations as grounds for a claim under 42 U.S.C. § 1983. They allege that the Mississippi Department of Health ("MDH") and their employees conducted three illegal searches of the Susie M. Brooks Child Care Facility. Specifically, the Plaintiffs allege that the agents had no probable cause to suspect child abuse was occurring in their facility, other than anonymous phone calls, and that their searches were thus illegal. Named as defendants are MDH, Theresa Patton, Cynthia Lesure, Tina Moore, and John Does 1-10, brought in their official capacity, as well as their individual capacity.

Defendants brought this Motion to Dismiss on the basis that a state agency is not liable under 42 U.S.C. § 1983, and as officials acting within the course and scope of their governmental duties, the

individuals are shielded by qualified immunity. Therefore, they aver, no action can be maintained against these defendants. After reviewing all pleadings, motions, and upon due consideration, the Court finds that this motion is well taken and should be granted.

A. Factual Background

The Plaintiffs' complaint alleges violations of their First, Fourth, Fifth, and Fourteenth Amendment rights for three supposed unconstitutional searches of the Susie M. Brooks Child Care Facility. Plaintiffs first contend that on January 29, 2004, Theresa Patton and Cynthia Lesure, acting in their capacity as MDH child care licensing officials, came to the Susie M. Brooks Child Care Facility in response to an "anonymous phone call" that the Director, Sindie House, had within the previous several days allegedly abused two children enrolled at the facility. Pursuant to gaining entry onto the premises, the child abuse charge was allegedly investigated "by search and seizure and interrogation." *Complaint,* ¶ 6. The Plaintiffs allege that during that initial child abuse investigation, Sindie House was unlawfully taken into custody for interrogation and other Plaintiffs were threatened with jail time unless they agreed to testify against Sindie House. The Plaintiffs maintain that after the child abuse investigation was complete, the licensing officials then engaged in a general regulatory inspection. The final result of the regulatory inspection was a $350 fine for improper

discipline for having a child under the age of three years in "time out." No formal abuse charges were ever made stemming from this investigation.

The second incident complained of by the Plaintiffs involved Alfred Dean King, a private investigator hired by Plaintiff Deborah Ellis. On May 13, 2004, King called Theresa Patton at the MDH to inquire as to how a citizen would make a complaint of child abuse against a day care provider. She allegedly informed him that a complaint could be made anonymously or by giving a name. King additionally asked whether MDH had any current complaints against any child care providers in Leflore County, to which Ms. Patton replied that MDH was in the process of investigating the Susie M. Brooks Child Care Facility. The next day, Patton, along with three other agency employees (Does 1, 2, 3) arrived at the Susie M. Brooks Child Care Facility to investigate an anonymous child abuse complaint received the day before. The Plaintiffs contend that MDH and its officers illegally investigated the Susie M. Brooks Child Care Facility based on the telephone call from their private investigator who did not made any allegation of child abuse at that facility. Patton charged the Susie M. Brooks Child Care Facility with an administrative violation during that incident.

The third incident occurred on December 14, 2005, when Tina Moore appeared at the Susie M. Brooks Child Care Facility with two other MDH employees (Does 4 and 5). She announced she was there to investigate a child abuse charge that a care giver had

struck a child. She stated the complainant parent asked to remain anonymous. She further requested the personnel file of the alleged abuser, Sandifer, the personnel file of Deborah Ellis and the facility's file on the child allegedly abused. After a brief interrogation of the alleged abuser, Deborah Ellis asked the investigators to leave, and they complied with this request. No formal child abuse charges were ever made.

The Plaintiffs specifically allege that the three searches were unconstitutional or unlawful for the following reasons: (1) the defendants had no statutory authority to conduct a search or investigation into an allegation of child abuse unless and until a referral is made to MDH by the Mississippi Department of Human Services; (2) no search warrant was obtained for the criminal charge of "child abuse" against the Plaintiffs; and (3) an "anonymous" phone call is not probable cause for the issuance of a criminal search warrant. Moreover, the Plaintiffs contend that the MDH regulations and any administrative search pursuant thereto violate the Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, in the following particulars: the regulation does not carefully limit the time, place, and scope of the search and, therefore, does not limit the discretion of the inspecting officers.

B. Discussion and Analysis

I. Standard for a Motion to Dismiss

"A Rule 12(b)(6) motion is disfavored, and it is rarely granted. *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986); *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981). Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. *Clark*, 794 F.2d at 970; *Boudeloche v. Grow Chem. Coatings Corp.*, 728 F.2d 759, 762 (5th Cir. 1984). "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." *Clark*, 794 F.2d at 970; *see also Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 926 (5th Cir. 1988); *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 549 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002, 68 L. Ed. 2d 858, 101 S. Ct. 2341 (1981). Dismissal is appropriate only when the court accepts as true all well-pled allegations of fact and, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thomas v. Smith*, 897 F.2d 154, 156 (5th Cir. 1989) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)); *see Mahone*, 836 F.2d at 926; *McLean v. International Harvester*, 817 F.2d 1214, 1217 n.3 (5th Cir. 1987); *Jones v. United States*, 729 F.2d 326, 330 (5th Cir. 1984).

While dismissal under Rule 12(b)(6) ordinarily is determined by whether the facts alleged, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. *Clark,* 794 F.2d at 970; *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied,* 459 U.S. 1105, 103 S. Ct. 729, 74 L. Ed. 2d 953 (1983).

II. Immunity under Section 1983

The Plaintiffs bring their claims pursuant to 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(a) Mississippi Department of Health

The Mississippi Department of Health asserts it is immune from suit based on its relation as an arm of the State. Indeed, the United States Supreme Court has recognized that a federal court § 1983 suit against a state for any type of relief is precluded as

that entity is not a "person" as required by the statute, a ruling that has been extended to state agencies as well. *Alabama v. Pugh,* 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978). Moreover, in *Will v. Michigan Department of State Police,* the United States Supreme Court established that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal or state court. 491 U.S. 58, 70, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

Plaintiffs contend that the Defendants have waived their Eleventh Amendment immunity by removing the case from state to federal court and cite *Lapides v. Board of Regents* as support for this position. 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002). Indeed, the Supreme Court noted in *Lapides* that a State, in removing a case from state to federal does waive the protections of the Eleventh Amendment. However, the issue here is not whether the MDH is covered under Eleventh Amendment immunity, but rather, are they able to be sued under § 1983. Therefore, the first inquiry is whether the Mississippi Department of Health is considered an arm of the State.

The Fifth Circuit has held that to determine whether an entity is an arm of the state, the court must consider the following: (1) the state law characterization of the entity; (2) the source of the entity's funding; (3) the degree of the entity's local autonomy; (4) whether the entity is concerned primarily with state or local problems; (5) whether

the entity has authority to sue and be sued in its own name; and (6) whether the entity has a right to hold and use the property. *Skelton v. Camp,* 234 F.3d 292, 297 (5th Cir. 2000) (citing *Clark v. Tarrant County, Texas,* 798 F.2d 736, 744-45 (1986) (outlining factors to determine whether an entity is an arm of state)). This test is commonly referred to as the "*Clark*" test and the Fifth Circuit has informed the lower courts that "[t]he second factor is usually accorded the most weight." *Skelton,* 234 F.3d at 297-98 (citing *Delahoussaye v. City of New Iberia,* 937 F.2d 144, 147-48 (5th Cir. 1991)).

The statutory framework for the Mississippi Department of Health is found at Mississippi Code Section 43-3-15, *et seq.* (Rev. 2007). That statute recognizes that the Mississippi Department of Health is an extension of the State Board of Health and is to be the enforcement mechanism of the public health policies and programs instituted by the State Board of Health. *See* Miss. Code Ann. § 43-3-15(5)(a). Indeed, a statutory role of the State Board of Health is to formulate the policy of the State Department of Health regarding public health matters. Miss. Code Ann. § 43-3-15(1)(b)(I). Section 43-3-15(5)(a) specifically enumerates several areas in which the Mississippi Department of Health administers programs for the State Board of Health, including, but not limited to, maternal and child health, control of communicable diseases, and child care licensure. Therefore, the statutory characterization of the Mississippi Department of Health is as an administrative and implementation

department working in conjunction with the State Board of Health.

Section 43-20-12 notes that all fees and penalties collected by MDH in their capacity as licensing agents of child care facilities are deposited into a "special fund" created in the State Treasury which is used for the implementation and administration of the licensing statutes. Therefore, the court finds that MDH is funded through the State Treasury, the state legislature, and by fees from those seeking to legally operate child care facilities within the State.

The Child Care Licensing Law, found at Mississippi Code § 43-20-1, *et seq.*, characterizes the MDH as a licensing agency. As a licensing agency under the Mississippi Code, MDH is authorized to promulgate rules and regulations concerning the licensing and regulation of child care facilities. Miss. Code Ann. § 43-20-8(1)(a). Moreover, MDH has the unfettered authority to issue, deny, suspend or revoke licenses, set and collect fees and penalties, and have "such other powers as may be required to carry out the provisions of [the Child Care Licensing Laws]."

The entity at issue here, a licensing agent of child care facilities, is primarily concerned with statewide problems. As stated above, MDH has been charged with promulgating regulations and rules for the licensing and regulation of child care facilities. Additionally, they wield state-wide power over the licensees once they are issued. More generally, the MDH is given wide latitude in the enforcement and

administration of State Board of Health programs. No statutory reference is made to the locality of those programs, but since the State Board of Health is a state-wide organization, factor four of the *Clark* test is satisfied that MDH is concerned primarily with state-wide problems.

Mississippi Code § 43-20-8(7) states that under this statutory scheme for the licensing of child care facilities, "[t]he licensing agency and its agents, officers, employees, attorneys and representatives shall not be held civilly liable for any findings, recommendations or actions taken under this section." Clearly, in their capacity as licensing agents, the Mississippi State Legislature has precluded MDH from suit under the Child Care Licensing Laws. Moreover, in its role as investigator of child care facilities, the Legislature has specifically precluded suit against the MDH noting that "[t]he Department of Health shall not be held civilly liable" for releasing information obtained as a result of an investigation of abuse. Miss. Code Ann. § 43-21-257(4). Therefore, statutory limits on MDH's liability have been established to civilly protect that institution.

The Mississippi Department of Health's authority to hold and use property is not expressly addressed in the statutes mentioned above. MDH is allowed to charge and collect a fee and any necessary costs incurred by the licensing agency for criminal history record checks. Licensing fees paid to the MDH under § 43-20-11 and all fees and penalties are deposited into the State Treasury and are to be used for the

"implementation and administration" of the Child Care Licensing Laws when appropriated by the Legislature. Miss. Code Ann. § 43-20-12. We find that MDH has abrogated its right to hold and use property to the State Treasury.

MDH brings forth other case law holding other entities as "arms of the State" and also alleges that MDH has implicitly been recognized as an arm of the State by a federal court. *See O'Neal v. Miss. Board of Nursing,* 113 F.3d 62 (5th Cir. 1997) (Mississippi Board of Nursing); *Cooley v. Miss. Dep't of Transp.,* 96 F. Supp. 2d 565 (S.D. Miss, 2000) (Mississippi Department of Transportation); *Kinnison v. Miss. Dep't of Wildlife, Fisheries, and Parks,* 990 F. Supp. 481 (S.D. Miss. 1998) (Mississippi Department of Wildlife, Fisheries, and Parks); *King v. Miss. Hwy. Patrol,* 827 F. Supp. 402 (S.D. Miss. 1993) (Mississippi Highway Patrol); *Scanlon v. Dep't of Mental Health,* 828 F. Supp. 421 (S.D. Miss. 1993) (Mississippi Department of Mental Health); *Chrissy F. V. Miss. Dep't of Public Welfare,* 780 F. Supp. 1104 (S.D. Miss. 1991) (Mississippi Department of Public Welfare); *Davis v. State Dep't of Health,* 744 F. Supp. 756, 758 n.1 (S.D. Miss. 1990) (recognizing by admission of plaintiff that claims against MDH and individuals in official capacity were not viable under Section 1983).

This Court, therefore, finds as a result of the *Clark* analysis undertaken above, and in recognition of case authority approving same, that MDH is an "arm of the State" for § 1983 immunity purposes.

Because the Court finds here that the Mississippi Department of Health is an "arm of the State" in accord with *Skelton,* 234 F.3d 292, and *Clark,* 798 F.2d 736, the entity is not subject to suit under § 1983, and is therefore, dismissed from this suit.

(b) Official Capacity Claims against State Employees

Next, we consider whether MDH employees are equally entitled to this defense. In *West v. Atkins,* the United States Supreme Court stated that "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." 487 U.S. 42, 50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). The Plaintiffs in this action have brought suit against the Defendants in their individual, as well as their official capacity. In *Kentucky v. Graham*, the Supreme Court explained the difference between individual capacity claims and official capacity claims:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against that entity. It is *not* a suit against the official personally, for the real

> party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgement in an official-capacity suit must look to the government entity itself.

473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (internal citations omitted). Therefore, a suit against a governmental employee in their official capacity is "no different from a suit against the State itself." *Will,* 491 U.S. at 71, 109 S. Ct. 2304.

Here, the Plaintiffs have sued Theresa Patton, Cynthia Lesure, Tina Moore, and Does 1-10 in their official capacities as employees of the Mississippi Department of Health. Because these defendants are sued in their official capacities as employees of the Mississippi State Department of Health, they are entitled to the same immunity under § 1983 available to MDH. *See Hafer v. Melo,* 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (noting that "the only immunities available to the defendant in an official-capacity action are those that the government entity possesses"). Therefore, suit cannot be maintained against Patton, Lesure, Moore, and Does 1-10 in their official capacity and they are hereby dismissed from this suit.

(c) Individual Capacity Claims of State Employees

The parties, however, cannot hide behind sovereign immunity as defendants in their individual capacities. In *Hafer v. Melo,* the Supreme Court unanimously held that state officials sued for damages in their personal capacities are "persons" within the meaning of § 1983, even when the claim is based upon the carrying out of official responsibilities. 502 U.S. 21, 112 S.Ct. 358. The Court rejected the novel proposition that the fact that the official acted under public authority, which fulfills the color of law requirement, insulates the official from personal liability. However, officials sued under § 1983 in their personal capacities may be able to assert a qualified immunity defense.

A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Under this test, an official who acted unconstitutionally, but did not violate clearly established federal law will be found to have acted in an objectively reasonable manner and will be protected from personal liability by qualified immunity. In *Wyatt v. Cole,* the Supreme Court held that *Harlow* qualified immunity applies to governmental officials "where it is necessary to preserve their ability to serve the public good or to ensure that

talented candidates were not deterred by the threat of damage suits from entering public service." 504 U.S. 158, 167, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). The Court further explained that the defense is designed to "protect the public at large, not to benefit its agents." *Id.* at 168.

Although qualified immunity is an affirmative defense, *see Gomez v. Toledo,* 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980), once the defendant pleads qualified immunity, the burden shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See Pierce v. Smith,* 117 F.3d 866, 871 (5th Cir. 1997) (where § 1983 defendant pleads qualified immunity and shows he is a government official whose position involves the exercise of discretion, plaintiff has the burden to rebut qualified immunity defense by establishing the violation of clearly established law). For a right to be clearly established, "there does not have to be a prior case directly on point, but the unlawfulness of the precipitating acts must be apparent in light of the existing law." *Hassan v. Lubbock Indep. Sch. Dist.,* 55 F.3d 1075, 1079 (5th Cir. 1995). Indeed, "the determination whether a right is 'clearly established' is a more particularized inquiry" that focuses on whether a reasonable official would know that the specific act in question was unlawful. *Anderson v. Creighton,* 483 U.S. 635, 639-40, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

Plaintiffs allege here that the Defendants have violated their First, Fourth, Fifth, and Fourteenth

Amendment rights. Specifically, the Plaintiffs assert that the Defendants committed an unreasonable search and seizure in violation of the Fourth Amendment's requirement of probable cause prior to search and seizure. "Discretionary duties enjoying a qualified immunity are duties positively imposed by law but which are dependent upon an officer's judgment or discretion." *Bankston v. Pass Rd. Tire Center, Inc.*, 611 So. 2d 998, 1008-09 (Miss. 1992). The Plaintiffs assert that the actions taken by the Defendants were not "duties positively imposed by law." Indeed, they contend that the MDH and its employees are not statutorily authorized to investigate child abuse allegations.

We note here that under Mississippi Code Section 43-20-15, MDH is authorized to "make or cause to be made inspections relative to compliance with the laws and regulations governing the licensure of child care facilities. Such inspections shall be made at least once a year but additional inspections may be made as often as deemed necessary by the licensing agency." However, the Plaintiffs contend that such duties of inspection regarding child abuse are governed by § 43-21-353, which provides that reports are to be made to the Department of Human Services, who in turn makes a referral to MDH if the abuse allegedly occurs in a licensed child care facility. There have been no facts alleged or raised that MDH received the child abuse tip from the Department of Human Services. However, this misstep does not

preclude the Defendants from asserting qualified immunity.

The Fourth Amendment protects individual's expectation of privacy, rather than specific places; if there is no expectation of privacy, individual's right to privacy cannot be violated, and search of such place is not unreasonable and not unconstitutional. A Fourth Amendment search does not occur unless the individual manifested a subjective expectation of privacy in the object of the challenged search and society is willing to recognize that expectation as reasonable. *See California v. Ciraolo,* 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) (outlining *Katz v. United States* test for reasonable expectation of privacy, found at 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). The Fifth Circuit has consistently held that "persons who engage in pervasively regulated industries have a diminished expectation of privacy" under the Fourth Amendment. *See United States v. Blocker,* 104 F.3d 720, 728 (5th Cir. 1997); *Donovan v. Dewey,* 452 U.S. 594, 598-99, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981) (holding that an expectation of privacy in commercial premises is different from, and indeed less than, a similar expectation in an individual's home).

To determine whether an industry is "pervasively regulated" such that a diminished expectation of privacy in the workplace is assumed, the Supreme Court, in *New York v. Burger,* set out the following factors to be analyzed by the lower courts: whether the regulations concerning the activity are extensive; whether

an operator can engage in the industry without first obtaining a license, meaning that he must meet the registration requirements and must pay a fee; whether records must be maintained and made available for inspection; whether registration number must be displayed prominently; whether persons engaged in activity are subject to criminal penalties, as well as to the loss of license or civil fees for failure to comply with provisions; whether other states have imposed similarly extensive regulations; and the duration of particular regulatory scheme and history of government regulations. 482 U.S. 691, 703-04, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

Section 43-20-8 of the Mississippi Code sets out some of the duties imposed on child care facilities operating within the State of Mississippi. Specifically, the statute requires that child care facilities develop and maintain accurate contact lists for each child at the facility. Further, the statute mandates that facilities check and update current criminal record backgrounds checks and child abuse registry lists often and allow the MDH to make regular investigations of the facilities to make sure they are in compliance with the statute. Other statutes regulating child care facilities govern the procedures and steps that must be taken in order to receive a license, fees associated with licensure, and steps taken for violating those regulations promulgated by MDH.

These regulations must be complied with if operators seek to establish and keep the license necessary for its operation. According to Mississippi Code

Section 43-20-9, "no person shall own, operate, conduct or maintain a child care facility in this state without a license." In order to obtain that license, Section 43-20-11 states that the person seeking the license must complete forms and provide required information, shall pay a licensing fee not to exceed $200, and present a certificate of inspection and approval by a local fire department and the MDH. Moreover, the section mandates that "[l]icenses shall be posted in a conspicuous place on the licensed premises." Miss. Code Ann. § 43-20-11.

In order to remain licensed, each child care facility must maintain certain records and make them available for MDH inspection. For example, all facilities must maintain records for the children in the facility, including medical and immunization records, staff records, which include background checks and personnel actions, and safety inspections.

Section 43-20-14 concerns the denial, suspension, or revocation of licenses to child care facilities and states that the licensing agency may suspend, revoke, or restrict the license of any child care facility for failure to comply with the provisions of the Act or regulations governing the licensing and regulation of child care facilities promulgated by the MDH. Miss. Code Ann. § 43-20-14(3)(c). Indeed, the act states that "[a]ny conduct, or failure to act, that is found or determined by the licensing agency to threaten the health or safety of children at the facility entitles MDH to revoke the license." Miss. Code Ann. § 43-20-14(3)(d). This procedure is in keeping with the overall policy of

the Mississippi Child Care Licensing Law that "a child is not capable of protecting himself, and when his parents for any reason have relinquished his care to others, there arises the probability of exposure of that child to certain risks to his health and safety which require the offsetting statutory protection of licensing." Miss. Code Ann. § 43-20-3. Further, although no particular criminal penalties are outlined in the regulations for failure to comply with the provisions, the Plaintiffs have highlighted that § 43-21-353 imposes a criminal investigation where a licensed facility is the site of alleged child abuse, and requires MDH to provide information gathered to law enforcement agencies and the district attorney's office.

The Mississippi Child Care Licensing Law has been present in the Mississippi Code since the publication of those statutes in 1942. A quick glance at surrounding Fifth Circuit states and their child care licensing laws shows equally extensive regulations and time period for implementation. *See* Tennessee, T.C.A. § 40-19-7465, *et seq.* (creating minimum standards for licensing of child care facilities similar to Mississippi); Louisiana, R.S. 46:1401, *et seq.* (creating two state licensing classes for child care facilities; Class A, the more stringent qualification, closely resembles the Mississippi regulations).

Moreover, by accepting a license from MDH, the director has agreed to be subject to search and seizure by licensing agents at any time, with or without a search warrant, and with or without probable cause. *See Samson v. California,* 547 U.S. 843, 126

S. Ct. 2193, 165 L. Ed. 2d 250 (2006). Accordingly, the court finds today that there is a lower expectation of privacy in a child care facility due to the extensive regulatory guidelines and open access granted to parents of children enrolled there.

Pursuant to *Burger,,* warrantless searches are reasonable, and thus, constitutional if three criteria are met. 482 U.S. at 702-03, 107 S. Ct. 2636. First, there must be a substantial government interest in supporting the regulatory scheme. The government interest in this instance is the regulation of child care facilities and responding to allegations of child care abuse. This interest is related to the health and safety of children which is considered a substantial government interest. *Hill v. Colorado,* 530 U.S. 703, 715, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). Second, warrantless searches must be necessary to further the regulatory scheme. In *Donovan,* the Supreme Court recognized the futility of warning mine owners or operators of impending inspections. 452 U.S. at 600, 101 S. Ct. 2534 (1981). The Court noted that warning of impending inspections would thereby frustrate the purposes of the statute and prevent deterrence of safety and health violations. *Id.* at 603, 101 S. Ct. 2534. Likewise, here, warnings of impending inspections may prevent MDH from adequately performing their duties and jobs in the securing of health and safety standards for children in child care facilities. The third requirement for warrantless searches to be held reasonable is that the inspection program provides a constitutionally adequate

substitute for a warrant. *Burger*, 482 U.S. at 703, 107 S. Ct. 2636. The Court in *Burger* stated:

> In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

Id. (citations omitted). The MDH is statutorily imbued with the authority to investigate reports of child abuse at a licensed child care facility, as well as compliance with the regulations promulgated for the health and safety of the children in those facilities. Miss. Code Ann. § 43-21-353(8). The Child Care Licensing Laws provides notice that regular and unannounced inspections will occur as often as deemed necessary by the licensing agency. Miss. Code Ann, § 43-20-15. Moreover, those statutes provide notice of how to comply with the law by setting forth regulations and rules which apply to all licensed child care facilities. Miss. Code Ann. § 43-20-1, *et seq.* Accordingly, the MDH officers were sufficiently limited in scope in their search. The agents stated that they were inspecting an allegation of child abuse – which is within their statutory authority – and then searched for licensure violations – which they are statutorily authorized to do. Therefore, the warrantless searches engaged in by the MDH employees were reasonable, and thus constitutional.

Regardless of whether the Defendants violated a clearly established constitutional right or not, however, the Plaintiffs have not carried the burden of proving that the MDH employees' conduct was not objectively unreasonable. Thus, even if the searches were unconstitutional, the agents would be protected from liability due to their objectively reasonable conduct in investigating child abuse allegations, which they are statutorily authorized to do.

Therefore, because there is a lowered expectation of privacy in child care facilities due to the pervasively regulated nature, Defendants' searches were constitutional. *See, e.g., New York v. Burger,* 482 U.S. at 702-704, 107 S. Ct. 2636 (warrantless administrative inspection of premises of "closely regulated" business deemed constitutional); *Michigan v. Tyler,* 436 U.S. 499, 507-509, 511-512, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (administrative inspection of fire-damaged premises to determine cause of blaze held constitutional); *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 534-539, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (administrative inspection to ensure compliance with city housing code deemed constitutional).

The Defendants are entitled to conduct administrative searches pursuant to Mississippi law, and no notice or probable cause is needed to search such establishments, the MDH and its employees in their individual capacities are protected by qualified immunity from suit. Because the Plaintiffs did not satisfy their burden by putting forth any evidence that the

Defendants violated their First, Fifth, and Fourteenth Amendment rights, the Court finds those claims waived.

C. Conclusion

The Plaintiffs have failed to state a claim upon which relief can be granted. The actions on the part of MDH and its employees do not rise to the level of constitutional violations. Therefore, the allegations, even if accepted as true, do not state a claim for a violation of any rights secured to the Plaintiffs under the United States Constitution. Moreover, Defendants actions and conduct during the warrantless searches were not objectively unreasonable.

Accordingly, the Plaintiffs' cause of action is hereby dismissed as no facts alleged entitle them to relief.

A separate order shall this day be issued.

So ordered this the 8th day of May, 2008.

/s/ **Sharion Aycock**
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DEBORAH ELLIS, et al.	**PLAINTIFFS**
v.	**CIVIL ACTION NO.: 4:07CV81**
MISSISSIPPI DEPARTMENT OF HEALTH, et al.	**DEFENDANTS**

ORDER GRANTING MOTION TO DISMISS

(Filed May 8, 2008)

Pursuant to an opinion issued this day, it is hereby ORDERED that

(1) the Defendant's Motion to Dismiss [4] is GRANTED;

(2) the Plaintiff's claims are dismissed; and

(3) this case is CLOSED.

All memoranda, depositions, declarations and other materials considered by the court in ruling on this motion are hereby incorporated into and made a part of the record in this action.

SO ORDERED, this the 8th day of May.

/s/ Sharion Aycock
U.S. DISTRICT JUDGE